

CRIMINALIZATION OF MARITAL RAPE – AN URGENT NEED FOR A CHANGE IN LAWS

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ABSTRACT

Marriage is the union of two adults mutually consenting to cohabit with each other and share their interests both socially and legally. In India marriage is a sacred institution bringing together just not two individuals but two families. Marriage is not celebration for a day but its celebration for life. The institution of marriage brings along various rights such as, the right to cohabit, the right to produce an offspring, the right to enter in sexual relation. But many a times these right are misused. Rape in a matrimony is sheer violation of women's personal rights. In cases of rape in marriages the situation is unimaginable as the women has to forcefully cohabit with her rapist without uttering a word and has to go through the torture almost every day. This paper focuses on whether the factor of consent of a women in a wedlock is important for sexual intercourse? Whether the man can rather use force on the women just because she is his wife and he has a right over her? We must understand that in India there are plethora of laws protecting the right of a women but in a society which is patriarchal in nature since the time immemorial can a 'wife' say 'no' to her husband who wants to have a sexual intercourse and is her consent really regarded equally important? India is fast growing country and one of the strongest in the third world countries. Countries like United Kingdom, Canada, Australia and may other countries have criminalised the offense of marital rape, then why is it difficult for India to give women the right they she deserves? The need for criminalization of marital rape is an urgent need of the hour and India needs to save its women from the regular depredation of mental, physical emotional health.

Keyword: Rape, Marriage, Marital Rape, Constitutional rights, Free Consent.

INTRODUCTION

Whenever we talk about Rape it is automatically assumed that we are talking about Rape committed by an unknown person or an outsider. It is also pre assumed that women is the safest within the four walls of her home and amongst her family members. It is assumed that in a marriage, rape cannot take place as marriage itself gives the social and legal permission to consummate and thus the idea of using force or obtaining consent is ruled out.¹ This is in fact definitely true but not in all families. When a women is married she is expected to serve her new family all her heart and soul and make the marriage perfect. This is only possible when the women is mentally and physically capable of doing so. How can a women survive a marriage where her husband objectifies her, rapes her every day, in such cases the women is not mentally or physically healthy enough to carry a happy wedlock. The immense suffering that she goes through and bear it silently destroys her from within. So, when the women in the family is not stable how can the marriage be? But in India all is overlooked and this is considered her fate as now she is the wedded wife of someone and saying 'no' is not an option. Women since her childhood is taught that she is her Husband's property and whatever the husband says or does is right. But with changing time and women are now aware what is right or wrong but if there is a wrong done there must be a remedy², but sadly India has failed to provide protection to women on this front. Marital rape is a debatable topic in the present scenario where some believe that rape is rape whether committed by a stranger or by the lady's own husband, the lack of consent is prevalent in both circumstances on the other hand some believe that criminalising of marital rape will destabilize the institution of marriage³.

The irony of our legal system is that when a women is raped by an outsider or a stranger the law is all pro women and provides all the required protection and treatment but when she is raped by her own husband who is married with all pomp and show, the law vanishes and all her fundamental rights of protection against all abuse fails to exist.⁴In many countries of Europe and Scandinavia the spousal rape was criminalised before 1970, but there are still a huge

¹ Ahmed Rashed and Shaba Jahan Nusrat; Critical Analysis of Marital Rape and Its Legal Consequences: Bangladesh Perspective, IOSR journal of Humanities and Social Science, Vol-21, July 2016.

² Ubi Jus Ibi Remedium, Common Law Rule-
<http://www.duhaime.org/LegalDictionary/U/UbiJusIbiRemedium.aspx>, accessed on 14-10-17

³ <http://www.thehindu.com/news/national/criminalising-marital-rape-will-destabilise-marriage-govt-tells-hc/article19581512.ece>, accessed on 14-08-18

⁴ Gupta Bhavish Dr, Gupta Meenu Dr; Marital Rape- Current Legal Framework of India and the need for change; Galgotia Journal of Legal Studies;2013

number of other countries including our India where there always remained a dilemma as to whether marital rape should be included in ordinary rape laws and thus the concept of marital rape has been outlawed.

CONCEPT OF MARITAL RAPE

Let us first understand the meaning of the word Rape. The word 'Rape' is derived from the latin word '*Rapio*' which means to seize. Therefore rape means that forceful seizure by a man on a women against her will, without her consent, further, it is the ravishment of a women against her will, without her consent by inducing her, by creating fear in her mind is called rape. It is clearly described in Section 375⁵ of the Indian Penal Code, 1860. The definition includes two important points, Firstly- 'against her will' and Secondly- 'without her consent'. It is thus an absolute law that any man who carries an act or attempts to carry an act of sexuality with a woman against her will and without her consent is rape. But the exception two brings out a contradicting fact that if the man is her husband then it will not be considered as rape. Here, we analyse that there is one common factor in both the scenarios that is the lack of consent the women. When the amount of force is same, the degree of cruelty is same, the degree of suffering is same and only because the perpetrator in the latter case is the women's husband the act is not rape.

The cause of such a negligence must be analysed here. Patriarchy is the essence of India society where women remain as the personal property of her husband where it is not just to accuse a

⁵ A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following de-scriptions:—

(First) — Against her will.

(Secondly) —Without her consent.

(Thirdly) — With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

(Fourthly) —With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be law-fully married.

(Fifthly) — With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupe-fying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

(Sixthly) — With or without her consent, when she is under sixteen years of age. Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

(Exception) —Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

man of violating his own property. The thought that women as his subject is born to serve men in all sphere is so much inculcated in the society that if a women is abused by her husband, she herself does not consider it wrong rather she accepts it as her destiny. In case of marital rape, forget society the law itself doesn't consider it as a crime. The alarming frequency of crime against women and the inadequacy of Rape laws and judgements in the country has brought down the safety standards for women in society to a staggering low point. Strong protests by social activists, jurists, judges, and scholars in general and women organisation in particular against the failure of law to protect victims of rape led the parliament to amend the rape law via Criminal Law (Amendment) Act 43 of 1983 to make the laws more realistic.⁶

The Violation of Human Rights

The right which every human carries and the right which makes every human equal to another. According to Article 1 of the Universal Declaration of Human Rights by the United Nations General Assembly in the year 1948 it has been laid down that, "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood".

In India the Constitution in every aspect has safeguarded the human rights of all its citizens through the Preamble, the Fundamental Rights and the Fundamental Duties. Violating anybody's basic human rights is violation their fundamental right enshrined in the constitution. Rape is a clear violation of person's basic human right. It violates the aspect of right to live in dignity. In Case of Marital Rape, the fact that the fundamental right of the wife and violation of her basic human right cannot be denied. And thus, Marital Rape must be criminalised.

SCENARIO IN INDIA

India is a progressive country and is developing fast. Along with the technological and infrastructural advancements it needs legal and sociological advances as well. Despite the prevalence of Marital Rape, this form of domestic violence have received a very little attention from society and Law. The Indian legal system has given its citizens ground breaking

⁶ Gaur K D, Criminal Law: Cases and Material, Pg-523; 5th edition, LexisNexis Butterworth Publication (2010)

judgements whether the recent judgement on declaring ‘it is rape, if a man even if is a husband has intercourse with his minor wife’⁷, but on the other hand it fails to recognise a vital side that when the woman is not a minor then that is also a rape. An unmarried women is considered an individual but when she is married off she herself becomes a property of her husband. India is one of the 36 countries around the world where Marital Rape is not criminalised yet. The explanation provided to us is at its epitome of absurdness, where it calls it a private matter between Husband and his wife and it is not fair to interfere in the personal matters of a matrimony. If we go by this logic then criminalising domestic violence is also a private matter and dowry is also private matter. Rape is heinous crime and its perpetrator is the lowest in eyes of humanity. Rape is Rape whether committed towards a stranger or to a wife, in both case the clauses 1 and 2 of section 375 IPC exists i.e, against her will and without her consent. Section 375 grossly discriminates among women who are unmarried and women who are married. In both cases their fundamental right to life⁸ and live with dignity⁹ is violated. Marital Rape is a common form of Domestic violence. A government organisation for women’s rights dealt with a case wherein a middle aged women called up the Human rights commission and accused her husband of forcing sexual contact with her. Her husband was a habitual visitor of sexual workers and she suspected him of having venereal diseases.¹⁰

Rape is the only crime where not only one’s life is put in danger but more than that her dignity is shattered, it destroys a human emotionally. It generates a sense of guilt into the victim’s mind forever. The social stigma attached to it brings the victim’s life to a dead end where she is not accepted by the society. In the case of *Oliga Tellis vs Bombay Municipal Corporation and others*¹¹ the court has interpreted the law in such a way that it includes right to life means right to live with dignity. If so much so is considered then the question arises that how the gross violation of human dignity in case of marital rape is overlooked and it simply rejected.

Marital rape is as grave as a normal rape. The effects on the victim in case of marital rape is more serious as she has to face her rapist every single second and bear it all silently. The rape

⁷ <https://indiankanoon.org/doc/87705010/> accessed on 25-08-2018; Independent Thought vs. Union of India

⁸ Article 21 of the constitution- Right to life- Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law.

⁹ Maneka Gandhi vs. UOI, AIR 1978 S.C. 597

¹⁰ Paranjape N.V Prof; Criminology and Penology, pg-172, 14th edition, Central Law Publication.

¹¹ AIR 1986 SC 180

continues every day. Why a man is free to rape his own wife? The simple answer because he is permitted by the law itself. In the case of *Bodhisattwa Gautam vs. Subhra Chakraborty*¹², the Supreme Court held that, 'Rape is a crime against basic human right and a violation against the victim's most cherished of the fundamental rights namely the right to life enshrined in the Article 21 of the Constitution'. But the irony is that yet the law fails to recognise Marital Rape as the gross violation of human rights and must be criminalised.

SITUATION IN SOME OF THE OTHER COUNTRIES

The concept is looked at as just another crime in other countries like America, Australia, Britain, Canada and Netherlands and may other countries.

America- Marital Rape is a criminal offence in all 50 states of America. The movement for Criminalization of marital rape began in the 1970s and was it became an offence in 1993. In 1984 in the court of appeal (New York) in the case of *People v. Liberta*¹³, Judge Sol Wachtler observed that, "A Marriage license should not be viewed for a husband to forcibly rape his wife with impunity. A married woman has the same right to control her own body as does an unmarried woman".

Australia- From 1976 to 1994, there were a series of laws that criminalised sexual assaults in Australia. A special report was made by Her Honour Justice Roma Mitchel, where she strongly condemned that a married woman had committed herself to indefinite sex, but Mitchel in her Report to the Labour Government did not mention anywhere that the immunity of the men should be taken away and that all the cases of marital sexual violence should be handled by the Family Courts. But the Labour Government instead removed Men's immunity even while the spouses still living together. It was observed by the attorney general that 'a woman should have the protection of the criminal law regardless whether she was married, unmarried, living with the spouse or not'.¹⁴

¹² (1996) 1 SCC 490

¹³ 64. N.Y 2d 152

¹⁴ www.auswhn.org.au/blog/marital-rape/, accessed on 28-08-2018

Britain- The marital rape exception was abolished in England and Wales in 1991 by the Appellate Committee of the House of Lords in the Case of *R v. R*.¹⁵ In the case of *Regina v. R*¹⁶, on 23rd of October 1991 in this instant case The Law Lords unanimously barred and overruled the 250 years old notion that women agree to sexual intercourse on marriage and cannot retract that consent.

Canada- Since 1983 sexual assault upon wife is punishable in Canada. Marital rape as myth was expressly rejected by the law reforms (Criminal Law Amendment Act, SC 1980-81-82-83, c-125, s 19) as confirmed by the Supreme Court of Canada in the case of *R v. D.D.*¹⁷

Netherlands- Marital rape was criminalised in Netherland in the year 2001, the Criminal Procedure Code was amended to criminalise the offence.¹⁸

According to UN Women's 2011 report, out of 179 countries 52 had criminalised marital rape.¹⁹

MAJOR CAUSES OF MARITAL RAPE IN INDIA

A. Gender Inequality- in India the last recorded sex ration in 2011 by the Indian Government was 940 females per 1000 males.²⁰ Here we see a clear and huge difference between girls and boys, this difference is caused because almost every household has a strong wish to have a boy child instead of a girl child and in consequence when they have a girl child they abort the foetus.

B. Dominance- Dominance is the essence of Patriarchy. It is believed that a women being the subject of her husband or any other male member of the family is duty bound to obey their

¹⁵ https://en.wikipedia.org/wiki/Marital_rape, accessed on 04-09-2018

¹⁶ (1992) Cr. Appl.R.216

¹⁷ 2000 SCC 43

¹⁸ <http://evaw-global-database.unwomen.org/fr/countries/europe/netherlands/1991/criminalization-of-marital-rape>, accessed on 04-09-2018

¹⁹ <https://indianexpress.com/article/explained/marital-rape-a-crime-in-many-countries-an-exception-in-many-more-4821403/>, accessed on 04-09-2018

²⁰ <http://www.census2011.co.in/sexratio.php>, accessed on 27-08-2018.

orders, so she fulfils all her husband's orders without any question and this the main reason where a women is raped by her husband.

C. No Legal Support – In India the mere concept of rape by husband is not recognised and existing laws can cover any crime that deals with matrimony under section 498 A of IPC under cruelty by husband and in laws which was inserted to provide protection and secure the rights of women in case of any domestic abuse like wife battering, dowry deaths etc., but nowhere the picture of marital rape was brought. Nobody considered that sexual intercourse without wife's consent does fall under the category of Section 375 IPC. But the major legal support goes missing and this is one of the major reasons why marital rape is so much persistent in our society.

Sometimes the woman may not be interested in sexual intimacy for the reasons best known to her and as a result she denies to get involved in any sexual conduct with her husband. Generally, it is observed that men are over sexed than women are and the denial by wife to get involved any sexual activity with husband is treated like an insult to his manhood.²¹

THERE ARE VARIOUS TYPES²² OF MARITAL RAPE

1. The Battering Rape: Most of the marital rape cases falls under this category. The battering of the women is mainly during the sexual violence or when the husband coerces himself upon the wife when she does not give her consent to have an intercourse. The battering in some cases are so severe that it causes serious injuries to the victim and this continues days after days, the only reason being that the rapist is her own husband and she is left with no option than to silently suffer.
2. The Coerce only Rape: This includes forcing the wife to have intercourse but is not physically violent. In this case the husband used his body force when the wife denies to have intercourse.

²¹ <http://www.thehealthsite.com/sexual-health/marital-rape-what-are-its-causes-and-implications-k0617/>, accessed on 27-08-2018.

²² Mishra Saurav and Singh Sarvesh; Marital Rape- Myth, Reality and need for criminalisation; (2003) PL WebJour 12.

3. The Obsessive Rape: This type of rape is more of a sadistic and perverse nature. The victim is subjected to torture and various perverse sexual activities which may cause heavy damage to the victim physically.

4. Non- physical Sexual Coercion: According to a study in 2002 there came up several non-physical methods of coercion. Some women believed that they owe their husbands sex because they spent on the wives and maintained their livelihood, others believed that if they refused to have sexual intercourse with their husbands they could be subjected dire consequences. The fear in their minds coerced them and even though they wanted to refrain from sexual acts they submitted themselves to their husbands.²³

SEVERITY OF MARITAL RAPE

The severity on Marital Rape or sexual violence in India is very evident through the statistical numbers where according to the result of National Family Health Survey 2002-03, it was observed that every 66 women out of 100 experienced sexual violence where the perpetrator is their own husband. The crimes are seldom reported and thus the correct number of sexual violence by husbands on their wife is not recorded. According to a survey by the National Crime Records Bureau in 2005 the total number of rapes registered by men other than husbands was 5.8% but only 0.6% of rapes were registered in the name of the Husbands. The shocking difference is because the law does not recognise sexual violence in a matrimony as rape but as Cruelty and there is a huge difference between rape and Cruelty²⁴. In the Indian Penal Code, 1860, rape is punishable with Imprisonment for a term not less than for a term of seven years or may extend for life or for a term of ten years and is also liable for fine²⁵, but cruelty is punishable with an imprisonment for three years and fine. So the mere change in terms reduces the severity of the crime as well as its punishment.

²³ <http://www.thehealthsite.com/sexual-health/marital-rape-what-are-its-causes-and-implications-k0617/>, accessed on 27-08-2018.

²⁴ Section 498 A IPC.

²⁵ Section 376 IPC

EFFECTS AND CONSEQUENCES OF MARITAL RAPE

Rape in itself is one of the most gruesome crimes. It is altogether a different sect of crime in the category of Crime against human body. Rape is the outcome of a perverse mind set. Those who commit such crimes are psychologically sadistic persons exhibiting that tendency in rape forcibly committed by them.²⁶

As mentioned above Marital rape can cause damage in many ways to the victim. In cases of sexual abuse by the husband sometimes the victims goes through heavy physical damage and heavier mental damage. There are several cases where the victim suffered from Laceration²⁷, broken bones, torn muscles, black eyes etc., apart from these victim also suffers from mental trauma. It is found that women who are raped by their husbands face a lot of gynaecological problems such as vaginal and anal tearing, miscarriages, still births, urinary and bladder tract infections as a consequence of sexual violence²⁸. Other results of marital rape are HIV, Sexually Transmitted Infections, Vaginal bleeding/ infection, Genital Irritation, Chronic Pelvic Pain, and Urinary Tract Infection. It can also lead to high complication during pregnancy resulting in health problems for both mother and the child.²⁹ These are the extreme cases of physical harm caused in the case of marital rape apart from physical damage the strong mental agony cannot be over looked. The physical damage can be treated but the mental state in some cases has proven to be so grave that it cannot be restored. Then why marital rape is given the status of cruelty and not rape? It is only because the legal system believes that sexual activity between husband and wife is purely their personal matter and their privacy must be respected. One believe that is extremely disturbing is that married women believe that they have no right to deny sexual advances made by their husbands, in fact wives often don't realise that what is happening is wrong and they must protest. As per the effects of marital, there is absolutely no difference between marital rape and stranger rape, both carry equal psychiatric disorders such as major depression, obsessive compulsive disorder, social phobia and sexual dysfunction.³⁰

²⁶ T K Gopal vs. State of Karnataka (2003) 3 Supreme 706 (SC).

²⁷ A deep cut or tear in the flesh.

²⁸ Campbell, Jacquelyn C., and Soeken Karen. "Forced Sex and Intimate Partner Violence: Effects on Women's Risk and Women's Health." *Violence against Women* 5 (1999): 1017–1035.

²⁹ <http://www.realising-rights.org/docs/newsletter/Marital%20Rape%20Policy%20Brief%20for%20MPs.pdf>, accessed on 4-09-2018

³⁰ Rape in Marriage and in Dating Relationships: How bad is it for mental health; Kilpatrick DG, Best CL, Saunders BE, Vernen LV Ann; NY Acad Sci; 1988;528: 335-44

Hence, post traumatic disorder, stress, fear, anxiety and sexual dysfunction are few consequences of marital rape.³¹ Marital Rape can pose a serious danger in a women's life, even risk of their own lives.

Therefore, looking at all the factors marital rape is no different from that of a stranger rape. In fact, whether in a matrimony or not rape is rape.

SUGGESTIONS AND CONCLUSION

There have been many arguments presented against criminalising marital rape. In the Court of Acting Chief Justice of Delhi High Court Gita Mittal, the argument from the Government's side is noteworthy in terms of why marital rape should not be criminalised. The argument thus presented included reasons such as, that Criminalising rape within marriages will deal a body blow to the institution of marriage, and it will throw open the floodgates of misuse and send hundreds of men behind bars³². But they failed to recognise the fact that the case of marital rape in India is so severe that it exists in almost all household. The position of women was completely ignored and rather how it will be misused was highlighted. It is rather a very shallow approach of the government to provide the women their basic sexual rights. There must be a deeper understanding on the concept of free consent and that if one partner is not willing to have intercourse he/she can't be forced. People should be educated on that with changing times and society the theory of patriarchy should also fade away as this is the age of equality and not Dominance. It is a high time when women must be made aware on the severity and the consequences they will face if they regularly face marital rape. Now, what can be done to bring awareness to women?

1. In every block in a district there should be classes held to educate not only women but also men that if women are raped on daily basis how bad can it get for them mentally as well as physically.

³¹ Frieze IH; Investigating the causes and Consequences of Marital Rape, Signs; 1983; 8(31): 532-553

³² <http://www.hindustantimes.com/opinion/there-must-be-zero-tolerance-for-marital-rape-from-all-quarters/story-4UzRhD3zjvikjQGPHCwLHJ.html>, accessed on 4-09-2018.

2. Most importantly the government must not look at it as a form of simple cruelty, the fact that a rape is a rape whether done by a stranger or husband.
3. Section 375 IPC must omit exception clause³³.
4. The parliament must bring this serious issue into open discussion and introduce a new law which deals with marital rape.
5. The Police administration must treat marital rape exactly like rape by a stranger.
6. There must be free mental health treatment for women who is a victim of marital rape.

Every change needs to start from within. The main reason is as discussed above is the sense that women/wife is a property owned by her husband is thus, not eligible to give her consent. The understanding of free consent is the most crucial concept that must be provided by the older men in a family. Indian legal system must provide with penal provision which exclusively deals marital rape as rape and not simple cruelty by husband. The Clauses 1 and 2 of section 375 of the Indian Penal Code should be dealt as absolute and must not contain any sort of loophole i.e., it should not contain any exception clause because of such clauses a serious issue such as rape is prevalent in almost every household today, be it in the rural or urban area. Therefore, not just women who are unmarried needs protection, but the women who are married need protection from marital rape more.

³³ Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.